**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**ORDINARY ORIGINAL CIVIL JURISDICTION**
**APPEAL NO.572 OF 2001**
**IN**
**TESTAMENTARY SUIT NO.10 OF 1991**
**IN**
**TESTAMENTARY PETITION NO.519 OF 1990**

1. John Francis Anthony Gonsalves
   Indian Christian Inhabitant of
   Bombay, residing at Annette
   Apartment, 2, 35, St.Paul's Road,
   Bandra (West), Bombay 400 050.

2. Charles Willibroad Gonsalves
   Indian Christian Inhabitant of
   Bombay, residing at 701, Joanne
   Premises Co-operative Housing
   Society Ltd., Manuel Gonsalves
   Road, Bandra (West), Bombay 400 050, ..Appellants.
   (Orig. Petitioners)

Vs.

Mrs. Agnes Mary Conception Rebello
Indian Christian Inhabitant
residing at 1, Kostka House,
St.Peter's Co-op. Hou. Soc. Ltd.,
Manuel Gonsalves Road,
Bandra (W), Mumbai 400 050 ..Respondent.
(Orig. Defendant/Caveatrix)

Mr.S.F.Rego with Mr.A.I.Shaikh, advs. for the Appellants.

Ms.K.C.Nichani, adv. for the Respondent.

**CORAM : D.K.DESHMUKH**
**& J.H.BHATIA, JJ.**
**RESERVED ON : 28TH AUGUST, 2007.**
**PRONOUNCED ON : 5TH SEPTEMBER,2007.**

**JUDGMENT: (Per J.H.Bhatia, J.)**

1. The original plaintiffs/petitioners have by this appeal challenging the dismissal of their petition no.519 of 1990 for probate of the will of their

deceased father by the learned Single Judge as per the judgment dated 27th March, 2001.

2. Admittedly, the petitioners are sons and the respondent/defendant is a married daughter of the deceased John Frederick Gonsalves, who died in Mumbai on 3rd January, 1983. Besides, the petitioners and respondent, the deceased John had also other sons and daughters. According to the petitioners, the deceased John executed the will and testament on 1-4-1979 whereby the petitioners are appointed as executors of his will. The petition for probate was filed in the year 1990. The respondent denied that any such will was executed by the deceased father and that the petitioners were appointed as executors. She also contended that even though the alleged will was executed on 1-4-1979, no steps were taken for getting it probated till the year 1990. She also contended that as late as March, 1990 all the legal heirs of the deceased including petitioners had represented to the Bank of India that the deceased John Frederick Gonsalves had died without leaving a will. Thus, none of the legal heirs including the petitioners had acted upon any such will till March, 1990. According to the respondent, the alleged will is bogus, concocted and invented only to deny the other heirs and legal representatives of the deceased their share in the

property of the deceased, who had died intestate.

3. The learned Single Judge framed certain issues and on behalf of the petitioners, Owen John D'Souza attesting witness was examined as P.W.1 and the petitioner John Francis Anthony Gonsalves as P.W.2. While the respondent examined herself as D.W.1. After hearing the evidence and the admissions given by the respondent as well as her counsel, the learned Single Judge held that the plaintiffs had proved that the will dated 1-4-1979 is the last will of the deceased John F. Gonsalves and also that he was in sound and disposing state of mind while executing the will. Having given these findings to Issue Nos.1 and 2, the learned Single Judge in response to Issue No.4 held that the plaintiffs had failed to prove that they had manifested their intention to act as executors and in the result, it was held that they are not entitled to grant of a probate. In the result, the petition came to be dismissed.

4. Heard the learned counsel for the parties and perused the record and proceedings. The learned counsel for the petitioner vehemently contended that the learned Single Judge has misdirected the proceeding and had come to the contrary conclusions in view of the fact that on one hand he held that the will was proved

as a last will and on the other he also held that the petitioners are not entitled to get a probate as they had not manifested their intention to act as the executors. According to the learned counsel, the learned Single Judge wrongly came to conclusion that there was twenty-one years delay in seeking probate after execution of the will and thus the petitioners had not manifested their intention to act as executors.

5. Evidence on record reveals that P.W.1 Owen J. D'Souza was attesting witness of the will Exhibit A. According to him, the deceased was his friend and frequent visitor to his place. According to him, the deceased had come to him with a prepared will on 1-4-1979 and in presence of himself and his son, he had put his signatures on the said will and put the same in one packet and then he had gone away with the said will. The respondent, who is the daughter of the deceased admitted in her evidence that the signature on the will is of her deceased father. Not only this, she also admitted the writing on will to be of her deceased father. In view of this admission, the learned Single Judge noted that the learned counsel for the respondent had not seriously disputed and challenged the execution and valid attestation of the will. Thus, it is proved that the deceased John F. Gonsalves had executed the will Exhibit A on 1-4-1979. It is also proved by the

evidence of P.W.1 Owen J. D'Souza that at the time of execution of the will, he was in sound mental and physical health. It is nobody's case that any other will was executed by him after this and, therefore, it is proved that it was his last will.

6. The learned Single Judge observed that the petitioners had not taken any steps to get the will probated for a period of twenty-one years and this inordinate delay on their part reveals that they had no intention to act as executors of the will. It was deposed by the petitioner no.1 John Francis Anthony Gonsalves that he and his brothers were not aware about the execution of such a will by their father. Their father died in 1983 and their mother also died in 1987. Under the presumption that there was no such will, they had disposed off some movable articles. According to him, till March, 1990, they were not aware about the will, and, therefore, even a statement was made before Bank of India by all the legal heirs that their father had died intestate. In April, 1990, during search of the cupboard of their mother, they found a packet containing the will and, thereafter almost immediately petition for probate was filed. The respondent in her evidence deposed that about two months after the death of her father, her mother had told her that her father had left behind the will but she also does not state

anywhere that this fact was disclosed to anybody else. She does not depose that this fact was known to the petitioners or other siblings of the parties. She admitted that in March, 1990 alongwith her brothers and sisters, she had also made declaration on an affidavit before the Bank of India that their father had died intestate and in that affidavit she had not disclosed that there was any such will executed by her father. It indicates that the petitioners were not aware about the will of their father till March, 1990 and, therefore, there could be no reason to disbelieve the version of the petitioners that they came to know about this will only in the month of April, 1990 during the search of the cupboard of their deceased mother.

7. It is really difficult to understand on what basis the learned Single Judge came to the conclusion that there was gross delay of twenty-one years in seeking probate of the will. Now it is proved that the will was executed on 1-4-1979 and John F. Gonsalves died on 3-1-1983. Till his death, there was no question of seeking probate of his will. This question could arise only after his death. Thus, the probate was sought about 11 years after execution of the will and about seven years after the death of the deceased. The evidence on record clearly shows that the petitioners were not aware about this will and even

though according to the respondent, she was aware, there is nothing to show that she or her mother disclosed this fact to any other legal heirs. Taking into consideration this aspect, it is difficult to hold that there was any inordinate delay in propounding the will and seeking probate of the same. In view of the facts, the finding of the learned Single Judge on this count does not appear to be correct.

8. The learned Single Judge held that even though the will was proved, the petitioners were not entitled to get the legacy and probate because they had failed to manifest their intention to act as executors as required under Section 141 of the Indian Succession Act. Section 141 reads as follows:

> "141. **Legatee named as executor cannot take unless he shows intention to act as executor.-** If a legacy is bequeathed to a person who is named an executor of the Will, he shall not take the legacy, unless he proves the will or otherwise manifests an intention to act as executor."
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> Illustration
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> A legacy is given to A, who is named an executor. A orders the funeral according to the directions contained in the Will, and dies a few days after the testator, without having proved the Will. A has manifested an intention to act as executor.

On careful reading of Section 141, it becomes clear

that a person to whom a legacy is bequeathed and who is name as an executor of the will, shall not take the legacy unless he proves the will or otherwise manifests an intention to act as executor. If the will is proved, he takes a legacy. However, there may be circumstances where he does not have time and, therefore, he may not get the will proved but still if he manifests an intention to act as a executor, he gets a will. As per the illustration to Section 141, A, who is named an executor and to whom the legacy is given under the will, himself dies within a few days after the testator and, therefore, he could not prove the will but still as he orders the funeral according to the directions contained in the will, A has manifested an intention to act as executor and, therefore, he would also take the legacy, though the will is not proved. On careful perusal of the section, it appears that he has either to prove the will or otherwise to manifest the intention to act as executor. In the present case, evidence on record reveals that the petitioners came to know about the existence of will only in April, 1990 and shortly thereafter they filed the petition for probate and as per the evidence on record as well as findings of the trial Court, they have also proved the will. Therefore, there could be no difficulty in granting probate to them. In fact by immediately applying for probate, they have also

manifested their intention to act as an executors. The learned trial Court wrongly came to conclusion that the petitioners had not manifested their intention to act as executors for long period of twenty-one years and are not entitled to probate under Section 141 of the Indian Succession Act. Section 222 of the Indian Succession Act provides that probate shall be granted only to an executor appointed by the Will and under Section 224 probate may be granted to several executors simultaneously. Under Section 223 probate can be refused to a person, who is minor or is of unsound mind or is an association of individuals unless it is a company. In the present case, none of the circumstances are present under which probate could be refused under Section 223 of the Indian Succession Act.

9. Taking into consideration the facts and legal position, we are satisfied that the learned Single Judge wrongly refused the probate of will to the petitioners.

10. In the result, the appeal is allowed. Impugned judgment and order passed by the learned Single Judge are hereby set aside. Probate Petition No.519 of 1990 is hereby allowed. Probate be issued in favour of the petitioners as per the will Exhibit A of John Frederick Gonsalves on usual terms. Parties shall bear their own

costs.

**[D.K.DESHMUKH, J.]**

**[J.H.BHATIA, J.]**